

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'SMC-2' : NEW DELHI)**

**BEFORE SHRI R.S. SYAL, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.2756/Del./2015
(ASSESSMENT YEAR : 2005-06)**

Mrs. Ann Kumar,
19, Nizamuddin East,
Ground Floor,
New Delhi – 110 013.

vs. DCIT, Circle 22 (1),
New Delhi.

(PAN : AAJPK4680R)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Sanat Kapoor and
Ms. Ananya Kapoor, Advocates
REVENUE BY : Shri Deepak Tiwari, Senior DR

Date of Hearing : 10.02.2016

Date of Order : 30.03.2016

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, Mrs. Ann Kumar (hereinafter referred to as 'the assessee'), by filing the present appeal sought to set aside the impugned order dated 23.03.2015 passed by the Commissioner of Income-tax (Appeals)-13, New Delhi qua the assessment year 2005-06 on the grounds inter alia that :-

“1. That the Notice u/s 148 and the reassessment order passed by the AO are illegal, bad in law, without jurisdiction and time barred and same is illegally upheld by CIT(A).

2. That CIT(A) has erred in law in not appreciating that notice under section 148 is time barred and there is no failure on the part of the appellant to disclose fully and truly material facts necessary for his assessment and hence order passed is without jurisdiction and bad in law.

3. That CIT(A) has erred in law in not appreciating that notice under section 148 is based on change of opinion and without any tangible material and hence order passed is without jurisdiction and bad in law.

4. That CIT(A) has, in view of the facts and circumstances of the case, erred in law and on facts in upholding disallowance the deduction of Rs.2,37,194/- u/s 10BA of the Act.

5. That CIT(A) has erred in law and on facts in not appreciating that decision of the Hon'ble Supreme Court is not applicable to the provision of 10BA of the Act.

6. That the observations of CIT(A) are factually incorrect and he has erred in not deleting the addition based on such observations.

7. That the interest u/s 234B has been wrongly and illegally charged and is liable to be deleted and wrongly worked out.

8. That the material available on record have not been properly considered and judicially interpreted and the same do not justify the addition made.

9. That the addition made is based on mere surmises and conjectures and the same cannot be justified by any material on record and the same are highly excessive.

10. The Appellant craves leave to add, amend, alter and/or delete any of the above grounds of appeal at or before the time of hearing.”

2. Briefly stated the facts of the case are : assessment of the assessee qua the assessment year 2005-06 was completed u/s 143(3) of the Income-tax Act, 1961 (hereinafter ‘the Act’) at an income of Rs.8,48,440/-. The assessee claimed an exemption of Rs.16,74,971/- inclusive of duty drawback amounting to

Rs.3,72,186/- under section 10BA of the Act which was allowed by the Assessing Officer. Subsequently, the AO found that the income chargeable to tax amounting to Rs.3,72,186/- has escaped assessment and consequently, issued the notice u/s 148 read with section 143 (2) of the Act. Shri S.C. Dang, CA appeared and filed reply explaining that the assessee has exported handmade artistic things to the tune of Rs.25,60,368/- and job work at Rs.97,56,374/- and earned duty drawback of Rs.3,72,186/- and claimed deduction u/s 10BA at Rs.16,74,971/- which has been allowed after due scrutiny. Finding the explanation of the assessee not tenable and by relying upon the judgment cited as Liberty India vs. CIT reported in 317 ITR 218 (SC) disallowed the deduction of Rs.16,74,971/- earlier allowed by the AO vide order u/s 143(3) of the Act and thereby the assessed the total income of assessee at Rs.10,85,634/-.

3. Assessee carried the matter before the Id. CIT (A) who has dismissed the appeal vide impugned order. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

4. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

5. The ld. AR for the assessee challenging the impugned order contended that apparently, this is a case of change of opinion on the part of the AO to invoke provisions u/s 148 of the Act which is not permissible under law and relied upon the judgment cited as **CIT Vs Atul Kumar Swami, 362 ITR 693 passed by Hon'ble Jurisdictional High Court and CIT Vs Tupperware India Pvt. Ltd., I.T.A. No. 415/2015 (Del.) order dated 10.08.2015.** However, on the other hand, ld. DR relied upon the order passed by the ld. CIT (A).

6. Now, advertent to the case had hand, a bare perusal of the assessment order under challenge goes to show that the assessment in this case has been reopened to review the applicability of section 10BA of the Act under which assessee had claimed exemption at the time of filing the original return of income qua assessment year 2005-06 on 27.10.2005. Hon'ble Jurisdictional High Court in the case cited as Atul Kumar Swami (supra), relied upon by the assessee, decided the identical issue and the operative part of the judgment is reproduced as under for ready reference :-

"REASSESSMENT-NOTICE-MUST BE BASED ON TANGIBLE MATERIAL-NOTE FORMING PART OF RETURN MENTIONING AND DESCRIBING THE NATURE OF

RECEIPT UNDER A NON- COMPETE AGREEMENT-NOTICE NOT MENTIONING ANY OTHER FRESH MATERIAL WARRANTING REOPENING OF ASSESSMENT-NOTICE NOT VALID-INCOME-TAX ACT, 1961, ss.147, 148.

A valid reopening of assessment has to be based only on tangible material to justify the conclusion that there is escapement of income.

Held accordingly, dismissing the appeal, that the note forming part of the return filed for the assessment year 1999-2000 clearly mentioned and described the nature of the receipt under a non-compete agreement. The reasons for the notice under section 147 of the Income-tax Act, 1961, nowhere mentioned that the Revenue came up with any other fresh material warranting reopening of assessment. Therefore, mere conclusion of the proceedings under section 143(1) ipso facto did not permit invocation of powers for reopening the assessment."

7. Identical issue has been decided by the Hon'ble Jurisdictional High Court in case of **Madhukar Khosla vs. ACIT - 354 ITR 356** wherein the Hon'ble Jurisdictional High Court has also followed its own decision rendered in the case entitled **CIT vs. Orient Craft Ltd.**, the operative part of the judgment (supra) is reproduced as under :-

"The argument of the revenue that an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in Rajesh Jhaveri (supra) would also appear to be self-defeating, because if an "intimation" is not an

"assessment" then it can never be subjected to Section 147 proceedings, for, that section covers only an "assessment" and we wonder if the revenue would be prepared to concede that position. It is nobody's case that an "intimation" cannot be subjected to Section 147 proceedings; all that is contended by the assessee, and quite rightly, is that if the revenue wants to invoke Section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under Section 143(3) and another applicable where an intimation was earlier issued under Section

143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under Section 148(2) on the ground that they do not meet the standards set in the various judicial pronouncements."

8. Following the law laid down by the Hon'ble jurisdictional High Court in the judgment (supra) discussed above, we are of the considered view that assuming of jurisdiction by the AO in this case is bad in law for the reasons inter alia that when the assessee has specifically claimed exemption u/s 10BA on the sum of duty drawback of Rs.3,72,186/- and the AO after applying its mind allowed the same, there was no tenable material with the AO to reopen the assessment; that applying the law laid down by Hon'ble Apex Court in judgment cited as Liberty India (supra) with retrospective effect is also not permissible under law.

9. No doubt, Hon'ble Apex Court in judgment cited as Liberty India (supra) held that incentive profits are not profits derived from eligible business u/s 80IA/80IB, they belong to the category of ancillary profits of such undertaking. Profits derived by way of incentive, such as, DEPB/Duty drawback cannot be credited against the cost of manufacture of goods debited in the profit and loss account and they do not fall within the expression "profits

derived from industrial undertaking” under section 80IB. However, judgment (supra) is not applicable to the facts and circumstances of the case because when reopening u/s 147/148 under the given circumstances is itself not permissible, the AO is not empowered to review the applicability of section 10BA. So, in the given circumstances, we are of the considered view that reassessment in this case is not permissible under any circumstances.

10. In view of what has been discussed above, we hereby allow the present appeal.

Order pronounced in open court on this 30th day of March, 2016.

**Sd/-
(R.S. SYAL)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 30th day of March, 2016
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-13, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**